

STATE OF MICHIGAN

IN THE

SUPREME COURT

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APPEAL FROM THE MICHIGAN COURT OF APPEALS

Owens, P.J. and Holbrook, Jr. and Gage, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court

No. 121050

-VS-

DEAN MADISON MARTIN,

Defendant-Appellee.

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Court of Appeals No. 231621

Oakland County CC No. 99-165609 FH

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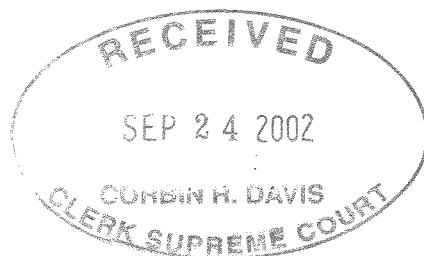
APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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## TABLE OF CONTENTS

INDEX TO AUTHORITIES CITED.....	iii
STATEMENT OF JURISDICTION.....	iv
STATEMENT OF QUESTION PRESENTED .....	v
STATEMENT OF FACTS .....	1
ARGUMENT .....	16
I. THE COURT OF APPEALS CLEARLY ERRED IN APPLYING <u>PEOPLE V THOUSAND</u> , 465 MICH 149 (2001) TO THE FACTS OF THE PRESENT CASE IN REVERSING DEFENDANT’S CONVICTIONS FOR SOLICITATION TO COMMIT FIRST DEGREE CRIMINAL SEXUAL CONDUCT.....	16
RELIEF .....	30

## INDEX TO AUTHORITIES CITED

### CASES

<u>Meyer v State</u> , 425 A2d 664 (Md App, 1981) .....	27
<u>People v Barrera</u> , 451 Mich 261 (1996).....	16
<u>People v Breton</u> , 603 NE2d 1290 (Ill App, 1992) .....	27
<u>People v Crawford</u> , 232 Mich App 608 (1998) .....	27
<u>People v Rehkopf</u> , 422 Mich 198 (1985).....	18
<u>People v Salazar</u> , 140 Mich App 137 (1985).....	27
<u>People v Vanderliner</u> , 192 Mich App 447 (1992).....	18, 27
<u>United States v Devorkin</u> , 159 F3d 465 (9th Cir., 1998).....	27

### STATUTES

MCL 750.145c(2).....	1
MCL 750.145c(3).....	1
MCL 750.157b .....	1
MCL 750.520b(1)(a) .....	20
18 USCS § 2423 .....	24

### RULES

CJI 2d, 10.6 .....	23
--------------------	----

### SECONDARY AUTHORITY

LaFave and Scottt, Substantive Criminal law, Chap 6.1, P. 15 .....	23
--	----

## STATEMENT OF JURISDICTION

This Court entered an Order (26a) on July 22, 2002, granting Plaintiff-Appellant's application for leave to appeal from an Unpublished Per Curiam Opinion of December 28, 2001, of the Court of Appeals. (Owens, P.J., Holbrook, Jr. and Gage, JJ.). (21a). The Court of Appeals affirmed Defendant's plea based convictions on four counts of distribution of child sexually abusive material, MCL 750.145c(3) and one count of child sexually abusive activity, MCL 750.145c(2). However, the Court reversed Defendant's convictions on three counts of solicitation to commit first degree criminal sexual conduct, relying on this Court's opinion in People v Thousand, 465 Mich 149 (2001). This Court granted the People's application for leave to appeal as to that portion of the Court of Appeals opinion which reversed the convictions for the three counts of solicitation.

STATEMENT OF QUESTION PRESENTED

I. WHETHER THE COURT OF APPEALS CLEARLY ERRED IN APPLYING PEOPLE V THOUSAND, 465 MICH 149 (2001) IN REVERSING DEFENDANT'S CONVICTIONS FOR SOLICITATION TO COMMIT FIRST DEGREE CRIMINAL SEXUAL CONDUCT?

The People contend the answer is, "Yes."

The Defendant will likely contend the answer is, "No."

## STATEMENT OF FACTS

Defendant Dean Martin was charged in five separate Informations with a total of eight felony offenses consisting of four counts of distribution or promotion of child abusive commercial activity contrary to MCL 750.145c(3), one count of child sexual abusive activity contrary to MCL 750.145c(2), and three counts of solicitation to commit first degree criminal sexual conduct contrary to MCL 750.157b(3). These various cases and charges resulted from an investigation which was conducted by Detective Michael DiMatteo of the San Bernardino, California, Police Department, in conjunction with the Oakland County Sheriff's Department, involving communications with Defendant over the internet.

On December 1, 1999, Defendant entered guilty pleas to the all eight charges against him. On December 20, 1999, Defendant was sentenced to terms of 4 to 7 years on the four convictions for child abusive commercial activity, distributing or promoting, to 5 to 20 years on the conviction for child sexual abusive activity. and to 40 to 60 months on the three convictions for solicitation to commit first degree criminal sexual conduct. (See Judgment of Sentence).

On December 28, 2001, the Michigan Court of Appeals issued an unpublished opinion affirming in part and reversing in part Defendant's convictions. The Court upheld the finding of the trial court that Defendant had not been entrapped in this matter, a claim which Defendant had raised on appeal. The Court also upheld the four convictions for child abusive commercial activity, distributing or promoting, and the one conviction for child abusive activity. However, the Court vacated the convictions for solicitation to

commit first degree criminal sexual conduct (Oakland docket no. 99-165609 FH; see 15a-16a) based solely on this Court's opinion in People v Thousand, 465 Mich 149 (2001). (23a).

In January, 2002, the People filed a motion for rehearing in the Court of Appeals concerning that portion of the Court's opinion which vacated Defendant's convictions for solicitation to commit first degree criminal sexual conduct. Basically, the People contended in their motion that the Court had misapplied the holding in Thousand to the facts of this case. On February 12, 2002, the Court of Appeals issued an Order denying the People's motion for rehearing. (25a).

Thereafter, the People sought leave to appeal in this Court regarding that portion of the Court of Appeals opinion that related to the dismissal of the three convictions for solicitation to commit first degree criminal sexual conduct and the motion for rehearing which the Court of Appeals denied in that regard. On July 22, 2002, this Court granted the People's application. (26a).

Following the preliminary examination on the charges in this cause Defendant was bound over for trial as charged. In the trial court, Defendant filed a pre-trial motion seeking to dismiss the charges on the ground of entrapment and on the claim of legal impossibility. On September 30, 1999, a hearing on the motions was conducted in the trial court. At the hearing only one witness testified, Detective Michael DiMatteo, who conducted the internet investigation. <sup>1</sup> Detective DiMatteo was assigned to the

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<sup>1</sup> Detective DiMatteo was actually an officer with the police department in San Bernardino, California. He was acting in conjunction with the Oalkand County Sheriff.

Specialized Investigation in the Crimes Against Children and had received specialized training in and had been investigating such crimes since 1988. (34a-35a). At the conclusion of the hearing and after hearing arguments and reviewing written briefs, the trial court entered a written opinion and order denying Defendant's motion to dismiss on the ground of impossibility.<sup>2</sup> (17a-20a). For purposes of this brief, the People set forth the following facts of the case which were developed at the hearing on the motions in the trial court.

At the hearing, Detective DiMatteo testified that from September 17, 1998, through November 6, 1998, he was conducting investigations of sexual abuse and exploitation of children under fourteen years of age involving the internet. At the outset of the investigation he was conducting a general investigation in which he offered child pornography for sale on the internet, operated a fictitious child prostitution ring along with other activities where people would send him child pornography via the internet. (36a-37a). DiMatteo would "place advertisements in various portions of the internet such as America On Line and in a portion of the internet commonly referred to as UseNet or the News Groups in which [he] would offer children for sale for sex." (37a). DiMatteo was not actually turning any child over to anyone to have sex, but it was part of an investigation "where people would meet with me and would pay me U.S. currency to engage in sexual activity with children under fourteen years of age." (37a).

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<sup>2</sup> The trial court also denied Defendant's motion to dismiss on the ground of entrapment. The Court of Appeals affirmed that ruling on appeal. The entrapment issue is not before this court.



Detective DiMatteo testified about an advertisement he placed on American On Line entitled "Valerie's Escorts." The ad inquired, "looking for someone to scratch that 'little' itch?" The ad was placed in a chat room titled "No Hair Yet" in which child pornography was being traded between different members. (37a-39a). DiMatteo placed his name on the chat room's mailing list and then received an electronic mail message with the names of several subjects who were trading in child pornography. DiMatteo attached his "Valerie's Escorts" advertisement to this mailing list and mailed it to everyone on the list. (38a). The names on the mailing list were people who were actually distributing child pornography over the internet. (39a).

Detective DiMatteo testified that after placing the ad he received electronic mail on September 17<sup>th</sup> from a subject using the screen name of "Luvyone." DiMatteo had not had any previous contact with that screen name. (41a-42a). The reply message received by DiMatteo asked what his message meant and stated, "I am interested." The reply also indicated that the person, later determined to be Defendant, was in the chat room, "No Hair Yet." (43a). Up to that point DiMatteo had not sent any e-mail specifically to Defendant. DiMatteo indicated that on the same date he received another e-mail from Defendant which stated, "Want Details." (44a).

DiMatteo further testified that he began communicating with Defendant. He indicated that he sent an e-mail "profile" request to Defendant which basically asked for his name, age, residence and what type of activity he wanted to engage in. (45a). Defendant responded that he wanted a white female, that ten years of age would be best, up to twelve, and that his special interest was "just young and small, like oral." (47a,

51a). In response to an inquiry as to what type of sex he was looking for, Defendant said in his e-mail to DiMatteo that, "[w]hatever she is capable of. I would never hurt her or do anything she did not want. I like to touch and have oral a lot." (52a). When asked if that was all, Defendant responded, "I would love to do it all and just be with her." (52a). DiMatteo indicated in response that he would be in touch with Defendant and Defendant responded, "Please do, I am anxious." Defendant also said, "OMG (oh my God), I can't wait." (T., Hearing, 47a, 51a-52a). DiMatteo indicated that "we" would be coming to Detroit in November if Defendant wanted to set something up. (53a).

DiMatteo further testified that he continued to communicate by e-mail with Defendant, asking for more specific information. Included in the communications was a "letter of sincerity" which DiMatteo asked Defendant to sign and return promising that he (Defendant) was not a police officer and that he was not involved in any type of investigation. DiMatteo and Defendant subsequently had an e-mail conversation (called Instant Messaging on AOL) in which Defendant responded to the letter of sincerity, "OMG" (oh my God) and "Plz" (please), "no, no, no, I am on the level. If you want me to send a young pic to prove it, I will." (50a). On the same day, DiMatteo received a picture depicting child pornography from Defendant. (50a). DiMatteo testified, "It depicts what appeared to be three pre-pubescent, white, female children engaged in sexual activity. All three of the children are touching each other. All three of the children are nude ... two of the children are touching the other children's vaginas with their hands." (55a). A second photo was also sent that same day (September 17<sup>th</sup>) by Defendant which depicted a young, pre-pubescent nude blond girl wearing only pink thigh high leggings. (56a-58a).

Detective DiMatteo further testified that later on the same day (September 17<sup>th</sup>) he sent Defendant, via e-mail, a picture of a pre-pubescent child, approximately ten to twelve years old and indicated that the child was available for him to engage in sexual activity with in exchange for money. (60a). A short time later, DiMatteo received from Defendant several more photographs of nude children and children engaging in sexual activity. In the attached message Defendant stated, "I'm so glad we have met." Further in the communication, Defendant described himself and stated he has always, "... been attracted to both sexes, even in my maturity." Finally, Defendant indicated, "[f]or many years I have wanted to experience and give sexual pleasure with and to pre-teen girls. I have never acted on this desire, yet I cannot suppress it and need to have this experience." (62a-63a). After indicating a preference of a girl between eight and twelve, Defendant state in his communication to Detective DiMatteo,

My actions. My fantasy is to be with the girl at first and get to know her, starting with innocent playing and petting. I am a very sexual person and very much enjoy oral sex. I would want to be touched and touch, even if it went no further than oral, I would be happy, bur penetration would be most welcome. I have never done anal, but would love to try.

(63a)

Detective DiMatteo further testified that on the following day, September 18, 1998, he sent Defendant several pictures of children clothed and indicated that the children were available for him to have sex with. (68a). One of the photographs in particular was of a young, white female child wearing a sun dress and sitting crossed legged. DiMatteo indicated to Defendant that the child's name was "Sandi" and that she

was nine years old.<sup>3</sup> (69a). Defendant responded to DiMatteo, "Mike, this exceeds my wildest dreams. I can't believe that I can be with them." Defendant also wrote, "I want to and will, if I have my way, have them all many times. This is so exciting." Defendant then asked DiMatteo if he had any other revealing pictures, "Kim especially." Defendant was then advised that they would be coming to Michigan in November and to "eat your Wheaties and start saving your money if you are interested." (70a-71a). Defendant responded, "I am looking forward for the first time ever to November, hee, hee." (73a). Later Defendant wrote (via e-mail), "Mike, while it is not a matter of which girl anymore, it is a matter of which first. I want to be with all of them eventually." Defendant also wrote that, "November time frame is good. I have a lot of questions to be answered on what will take place. Let me know, okay? I may have others who may be interested too, females." (73a-74a).

Detective DiMatteo indicated that on September 20, 1998, he received an e-mail from Defendant stating that he would like to set up something with "213," referring to the photograph of "Sandi." Defendant wanted her name because he wanted to get to know her "a little before" so as to make it "as pleasant for her as it will be for me." (74a-75a). Defendant stated, "Thanks for the name and picture. Sandi is a wonderful name. Kimmy is so very sweet. I'm looking forward to meeting her next. I will get the letter in the mail today. Thanks, Mike." (75a). Defendant also inquired if he could sent a gift to

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<sup>3</sup> "Sandi" ended up being the child Defendant paid DiMatteo and Steinhelper \$350 to have sex with. DiMatteo made clear on the record at the hearing that the girl was never actually offered or brought to Defendant or anything of that nature. (T., Hearing, 41).

"Sandi" and DiMatteo responded that "she would love it." (77a-78a). This was the first time gifts for "Sandi" were mentioned. (78a).

In an on line communication on September 23<sup>rd</sup>, DiMatteo told Defendant that "Sandi" was available if he wanted to speak with her on line. DiMatteo told Defendant he would get her and let her play on the computer and talk to him. After a period of time, Defendant wrote on line, "Oh yes, little one, and I am so forward to meeting you." (79a). Pretending to be "Sandi," Detective DiMatteo asked Defendant if he was really going to send a present. Defendant responded he was, maybe many presents, and that he would "surprise" her with "all kinds of stuff." (80a). Defendant then inquired of "Sandi" when her birthday was, referring to her as "little one." "Sandi" said she would be ten in June. DiMatteo (acting as "Sandi") then asked Defendant what he wanted to do and Defendant responded saying they could talk at first because he wanted "to get to know all about" her. (81a). Defendant then told "Sandi", "I love to go deep in the woods with no one around and swim in the fresh water with no clothes on, hee, hee." (82a). Defendant further told "Sandi", "Little one, I want to hold you and make you feel very good in my arms and I want to kiss you and have a lot of fun. I want you to like me most of all." (82a). Pretending to be "Sandi," DiMatteo asked, "Really? Are you going to kiss me all over?" Defendant replied, "All over a lot, can I do that?" "Sandi" asked Defendant, "Even on my cutchie?" Defendant replied that he did and that he wanted her to kiss him all over too and that he wanted to put his tongue in her and make her feel good. (82a-84a). When "Sandi" asked Defendant if he "was big" Defendant responded, "No, little one, not too big at all, just right for you. I would never want to hurt you, never." (83a-

84a). Defendant then wished "Sandi" good night and said that he had her in his mind "all the time" and that he was so looking forward to being with her. (84a). Later, DiMatteo asked in an e-mail what Defendant thought about "Sandi" and Defendant responded, "OMG (oh my God) she is so sweet. I love her." (86a). Defendant then said "Sandi" had asked if he could send "her" some pictures and Defendant said he would. (86a). DiMatteo then indicated to Defendant that maybe he would let him talk to "Sandi" on the telephone and Defendant stated that he wanted to do that "very badly." (87a). DiMatteo concluded the communication by asking Defendant to be discreet and Defendant indicated that being discreet was "most important" to him and that DiMatteo should not worry about that. (88a).

In a later communication, Defendant indicated he had gotten a small present for "Sandi" and wanted to be able to send it to DiMatteo's address. DiMatteo replied that that would be okay and asked what the present was. Defendant replied that it was a necklace. (91a).

On September 29<sup>th</sup>, Defendant sent DiMatteo, via e-mail, a picture of him and his daughter. (92a). About an hour later DiMatteo indicated in another e-mail communication to Defendant that, "Good news, we will be in Michigan from the 4<sup>th</sup> of November to the 16<sup>th</sup>." (93a). Defendant in reply sent DiMatteo his telephone number. (94a). A few minutes later, Defendant sent another communication in which he told DiMatteo, "I feel like a school kid waiting for his new girlfriend to call, hee, hee. Another picture for my Sandi is attached." (95a). A few minutes later, DiMatteo indicated to Defendant that he

was "going to set up something for the child, Sandi and the defendant to speak to each other." (96a).

Later on September 29<sup>th</sup> Defendant sent another communication in which he told DiMatteo, "Ever see a mature adult acted like such a kid. The thoughts of being with her does that to me. God, she is so sweet." There was also a comment by Defendant in the communication about sending some pictures to Sandi. (101a-102a). In another communication from Defendant to "Sandi" later on the same date Defendant told her she made him, "very, very happy and very aroused, hee, hee," and "[w]e're going to have so much fun together. I loved to be sucked and I love to eat. I was so hard when I was talking to you. I sure hope you don't mind me writing sexy like this." (103a). In that same communication, Defendant told "Sandi" that he would be taking pictures and film of them together, "[b]e prepared for a lot of pictures," and later, that his video camera had sound. (103a). In a later communication, Defendant stated to "Sandi":

Soon I will have movies of you and I together just for me. I can't wait. I find myself staring at your picture so much. O, by the way, I am going to bring a regular film-type camera so that I can take pictures of you that I can put on my desk at work and digitize for my computer.

(155a)

Defendant concluded the September 29<sup>th</sup> communication saying, "[w]hen I look at your little body and beautiful, beautiful face, I come so close to climaxing just with that." (103a, 120a, 154a).

On October 1<sup>st</sup>, Defendant sent an e-mail communication to DiMatteo apologizing and saying he could kick himself for not having been home to receive a phone call

DiMatteo had made. Defendant indicated that maybe some new arraignments could be made. (112a). A short time later, Defendant communicated to DiMatteo that all of this was "like a dream," and, "Oh Mike, thank you. I am so glad I was on that list, hee, hee." (115a). Defendant was referring to the mailing list testified to earlier in which DiMatteo had sent advertisements on AOL to people that were trading in child pornography. (116a).

Detective DiMatteo testified that in a communication on October 5<sup>th</sup>, Defendant indicated that he had obtained a telephone calling card so that "Sandi" could call him and talk to him on the telephone. Defendant gave DiMatteo the telephone number and PIN for the card. (122a-123a).

On October 6<sup>th</sup>, DiMatteo received another graphics file from Defendant which contained 17 pictures of girls. (123a-125a).

On October 8<sup>th</sup>, Defendant sent DiMatteo an electronic mail message from his business e-mail account. The message indicated that he (Defendant) had "shipped a box of priority mail for Sandi" but it did not include the video he had promised because there were some copying problems. Defendant said the video would be sent instead in three to five days. (126a).

On October 12<sup>th</sup>, DiMatteo sent an e-mail message to Defendant talking about when they could possibly meet, "when the defendant could meet to have sex with the nine year old girl in Detroit. " (127a-128a). Defendant said that DiMatteo could reach his page and cell phone numbers by calling his private phone at his business office and he gave DiMatteo the number. (128a). Defendant also commented that if DiMatteo needed



someone to look after "Sandi" at anytime during his visit and show her some sights, "I volunteer. I would make myself available at a moment's notice. (129a).

On October 14<sup>th</sup>, Defendant again wrote to "Sandi" telling her how much she meant to him, that she was the most precious girl he had ever known and that, "I stare at your picture all of the time." (130a). After telling her how much fun they would have together, Defendant said, "I want to see you do the splits you told me about so very badly and any other position you can think of." Defendant continued in the communication to "Sandi":

Okay, I'm going to get a little sexy here, hee, hee. Hope you don't mind. You know that just to hold you in my arms and kiss you a lot is something I am looking forward to most of all, but the sex we will have together is very exciting too. I want to kiss, lick and suck every part of you body. I love to do that but with you it will be like my first experience. I love it. I want you to suck me a lot, lots of different positions. I have thought about that a lot. I want to feel my penis inside you as I look into your eyes and kiss your lips. We will do a lot of positions. One that I really want to do is to have you on your feet, bent over at the waist with your legs spread apart and hands on the floor and me behind you. I will first lick your pussy a lot and put my tongue inside. Then I will put my penis in and hold you by the hips as I pump. Oh, this will be so much fun for both of us. ... I've got to stop that, I am at work and don't want to get too excited. This was just going to be a short note and I got a little long, sorry.

(130a-131a)

Detective DiMatteo further testified at the entrapment hearing that on October 15<sup>th</sup> Defendant sent an e-mail message to "Sandi" indicating how much he was looking forward to seeing her, that he would work out the details with "Mike," that he needed to see her and that he wished he could see a picture of her before they meet. (133a). Later

that day, Defendant sent an e-mail message to DiMatteo asking for all the time he could get to be with "Sandi" and that he wanted to go on the high side if that was possible. (134a).

On the next day, October 16<sup>th</sup>, Defendant sent DiMatteo an e-mail message from his place of business asking DiMatteo to page him so they could make final plans. "The 4<sup>th</sup> of November in the evening about 5:00 to 8:00 p.m. would be great." (135a). Defendant also indicated that, "Most assuredly, I would take Sandi overnight any night, anytime, anywhere. Nothing would make me more happy." Defendant also said, "I am so looking forward to this as you well know." (135a).

On October 19<sup>th</sup>, Defendant sent another e-mail from his work e-mail account and again gave his private work number and made another reference to the calling card he got for "Sandi." (136a).

Detective DiMatteo further testified that on October 21<sup>st</sup> he received in the regular mail a package from Defendant which contained a video tape. The tape depicted Defendant in a hotel room. On the tape, Defendant spoke for a few minutes to the fictitious "Sandi," telling her why he liked little girls. And then twice he masturbated and ejaculated onto the photograph of "Sandi." (148a). Defendant was heard saying, "I need to do this with you" or something to that effect. (148a-149a). The video was played for the court. (150a).

On October 22<sup>nd</sup>, DiMatteo said he received a e-mail from Defendant using his business e-mail account. Defendant indicated in the communication that monetary compensation had not been discussed for the scheduled activity with "Sandi." DiMatteo

send an e-mail in response saying that the usual price was \$350 and that he would rent the room so that Defendant would not have to pay for it. (140a). That amount was agreed on. (162a). On October 23<sup>rd</sup>, DiMatteo received another e-mail from Defendant in which Defendant expressed his satisfaction with the way things were progressing. (142a).

DiMatteo testified he received an electronic mail transmission from Defendant on October 28<sup>th</sup> in which Defendant expressed concern of not wanting anything to go wrong that might interfere with his seeing "Sandi." He again gave DiMatteo his cell phone and beeper numbers. (151a). Defendant also indicated he was changing the screen name which he was using. (152a).

DiMatteo further testified that the original meeting date for Defendant and "Sandi" was set for November 4<sup>th</sup> in Rochester Hills but that date had to be changed when Defendant's wife became suspicious when she came across an e-mail between him and DiMatteo. Defendant said he told his wife that the e-mail concerned a 19 year old prostitute and that he and his wife were going to get some counseling to take care of the problem and therefore the meeting date with "Sandi" had to be changed. (159a-160a). November 6<sup>th</sup> then became the meeting date. On that date the police had pre-rented two rooms next to each other with surveillance equipment set up in one of them. (160a-161a). On that date, DiMatteo, pretending to be "Mike" of the escort service, along with Sgt. Susan Steinhelper of the Oakland County Sheriff's Department, pretending to be "Valerie" of the escort service, met Defendant in the lobby of a Rochester Hills hotel. Defendant had \$350 with in an envelope as payment for the sex with "Sandi," and he was carrying a bag in which there was a video camera, a digital camera and other

miscellaneous items. Among those items was a black garter belt. DiMatteo testified, "Mr. Martin (the defendant) had previously mailed to the fictitious child, Sandi, two pairs of panties and a pair of thigh-high nylons, which I had received, and he brought the black garter belt because he wanted Sandi to wear that during his date with her." (163a-164a). A video tape of the encounter with Defendant at the hotel and his arrest was played for the court. (168a).

The People now seek appellate review of that portion of the Court of Appeals opinion which reversed Defendant's convictions for solicitation to commit first degree criminal sexual conduct.

## ARGUMENT

I. THE COURT OF APPEALS CLEARLY ERRED IN APPLYING THE HOLDING OF PEOPLE V THOUSAND, 465 MICH 149 (2001) IN REVERSING DEFENDANT'S CONVICTIONS FOR SOLICITATION TO COMMIT FIRST DEGREE CRIMINAL SEXUAL CONDUCT.

### STANDARD OF REVIEW

Questions of law and questions of the application of the law to the facts are reviewed de novo. People v Barrera, 451 Mich 261, 269, n. 7 (1996). Decisions of the Court of Appeals are reviewed for clear error. MCR 7.302(B)(5).

### DISCUSSION

Defendant was convicted in the Oakland County Circuit Court, inter alia, of three counts of solicitation to commit first degree criminal sexual conduct, MCL 750.157b(3) and MCL 750.520b(1)(a). Defendant thereafter sought appellate review of those three convictions along with five other convictions which are not at issue in this appeal. On or about December 28, 2001, the Court of Appeals issued an unpublished opinion upholding Defendant's convictions on the five other charges (involving distribution of child sexually abusive material and child sexually abusive activity). However, the Court reversed Defendant's convictions on the three counts which charged solicitation to commit first degree criminal sexual conduct. In reversing the convictions, the Court relied solely on this Court's decision in People v Thousand, 465 Mich 149, 156 (2001). (23a). The People contend that the Court of Appeals clearly erred in so ruling.

(A)

At the outset, a review of the Michigan law governing the crime of solicitation demonstrates that Defendant's convictions were proper. The statute under which the convictions in question in this appeal were obtained is set forth in MCL 750.157b(3), which provides:

Except as provided in subsection (2) [which specifically covers solicitations to commit murder], a person who solicits another person to do or omit to do an act which if completed would constitute an felony, is punishable as follows:

a) If the offense solicited is a felony punishable by imprisonment for life, or for five years or more, the person is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine not to exceed \$5,000, or both.

The statute also defines, in section (1), the word "solicit":

For purposes of this section, "solicit" means to offer to give, promise to give, or give any money or services, or anything of value, or to forgive or promise to forgive a debt or obligation.

Application of the facts of this case as set forth in the statement of facts to the above law demonstrates that Defendant was properly convicted of the solicitation charge. Defendant agreed to pay \$350 to have Officer DiMatteo, acting as "Mike," provide him with a minor female child who met Defendant specifications for purposes of engaging in acts of sexual penetration, both orally and vaginally. (42a-44a, 47a, 51a-52a, 55a, 63a, 70a-74a, 94a-95a, 115a, 122a-131a, 135a-136a, 140a-142a, 159a-162a). Defendant also indicated that he intended to take photographic and/or video pictures of his sexual activity with the 12 year old girl, "Sandi." (103a, 120a, 155a). The actions of "Mike," had they taken place, would have constituted the commission of a felony, either for aiding

and abetting first degree criminal sexual conduct under MCL 750.520 (b)(1)(a), or for violating MCL 750.145c(2) which prohibits child sexually abusive activity. That is to say, had “Mike” engaged in the conduct sought by Defendant in this case, a crime would have been committed. Even though there was no little girl named “Sandi” in this case, as was also true in People v Thousand, supra, (in the form of “Bekka” played by the police officer) there was a real person here in the form of Officer DiMatteo who would have committed as crime had he acted on Defendant’s solicitation. Thus, this case does not involve pure legal impossibility because the law prohibited the conduct Defendant Martin intended to commit. People v Thousand, supra, 158.

Moreover, the fact that the police officer acting as “Mike” did not in fact intend to supply Defendant with any minor child is of no import. The crime of solicitation is complete when the solicitation is made. People v Rehkopf, 422 Mich 198, 205, n. 3 (1985); People v Vanderliner, 192 Mich App 447, 450 (1992), lv den 440 Mich 878 (1992). The solicitation only requires that the defendant seek solicit the commission of a felony. The possibility of success is immaterial because it is not an element of the offense. See also People v Rehkopf, supra, 205, n. 3:

If the listener does not agree to the solicitation and possesses no intent of committing or attempting to commit the solicited offense, the speaker might, nonetheless, properly be found guilty of the common law offense of solicitation. See LaFave & Scott, § 58, p 414; Perkins & Boyce, p 649.

Thus, Defendant’s conviction for the crime of solicitation to commit first degree criminal sexual conduct was proper under existing Michigan law.

(B)

This Court's holding in People v Thousand, supra, does not require a different result, and the Court of Appeals holding in that regard is clearly in erroneous. The Court of Appeals stated in its opinion that this Court in Thousand "rejected the defendant's legal impossibility assertion, but concluded that the solicitation charge was properly dismissed because there was no evidence that defendant solicited anyone to do a criminal act. Id. at 168-169. In other words, because the detective in Thousand could not have engaged in criminal conduct, the defendant could not have solicited the detective to engage in criminal conduct. Id." (23a). The Court of Appeals then concluded that the factual scenario of the present case was "nearly identical" to that of Thousand and, accordingly, reversed Defendant's solicitation convictions. The Court stated in the unpublished opinion that, "[b]ecause "Sandi" was actually a police detective, there was no evidence that CSC I could have resulted from defendant's solicitation." (23a).

Contrary to the Court of Appeals ruling in this regard, the factual scenario of the present case is not "nearly identical" to that in People v Thousand supra. Indeed, and contrary to the conclusion of the Court of Appeals, Thousand makes clear that under the factual setting of the present case Defendant's solicitation convictions were proper and should have been affirmed.

In People v Thousand, supra, the police detective was himself posing as a fourteen year old girl, "Bekka," in an internet chat room. While using that screen name, the detective was approached by the defendant who described himself as a twenty-three-year- old male from Warren. The detective, acting as "Bekka," described herself.



Thereafter, for about a week, the detective, continuing to use the screen name “Bekka,” had conversations with the defendant which included graphic descriptions of sexual acts the defendant said he wanted to perform on her. Id., 151-152. The defendant then invited “Bekka” to come to his house for the purpose of engaging in sexual activity. “Bekka” indicated she was interested and they made plans to meet at a McDonalds restaurant. The detective who had posed as “Bekka,” along with other officers, came to the McDonalds restaurant at the time set for the meeting and arrested the defendant when he appeared. Id., 154.

Although this Court rejected the defense of legal impossibility in Thousand, it nevertheless agreed that the solicitation charge had been properly dismissed because there was an element of that statutory offense missing, namely evidence that the defendant had solicited anyone to commit a felony or do an act which would constitute a felony. Id., 168. In language of particular significance to the present case, this Court stated, “[p]ursuant to the plain statutory language [of the solicitation statute] the prosecution was required to present evidence that defendant requested that another person perform a criminal act.” Id. (emphasis in the opinion). The Court in Thousand found that the evidence there only showed that the defendant directly requested “Bekka” to engage in sexual acts with him. Id. There was no “another person” who was asked to engage in activity which would constitute criminal conduct. This Court then cited with approval the language of the Court of Appeals opinion in Thousand:

What is lacking here is defendant’s request to another person to commit a crime. “Bekka,” the fourteen-year-old online persona of Deputy Liczbinski, was not asked to commit a crime. That is, while it would be a crime for

defendant to engage in sexual intercourse with a fourteen-year-old girl, a fourteen-year-old girl is not committing a criminal offense (or at least not CSC III) by engaging in sexual intercourse with an adult. Thus, whether we look at this case as defendant asking fourteen-year-old "Bekka" to engage in sexual intercourse with him or as defendant asking Deputy Liczbinski to engage in sexual intercourse with him, he did not ask another person to commit CSC III...

People v Thousand, 241 Mich App 102, 111 (2000).

The present case differs significantly from Thousand in that here there was "another person" who was asked to commit a crime and, thus, the factual element missing in the solicitation charge in Thousand was in fact present in the instant case. Specifically, the other person here was Detective Michael DiMatteo, who was known to Defendant as "Mike." Defendant contacted Mike and asked him to obtain a young girl, preferably between the ages of ten and twelve, with whom he (Defendant) could have sex. Unlike Thousand, where the officer actually acted the role of the young girl "Bekka" to whom the sexual requests were made directly, the officer in the present case ("Mike") was asked by Defendant to supply a young girl with whom he could have sex. In other words, Defendant asked another person to commit criminal acts by asking that other person to procure a minor child with whom he could have sex. A review of the trial record in this cause, as set forth in the Statement of Facts, clearly supports this position.

In this case, Detective Michael DiMatteo conducted the internet investigation. (34a). Detective DiMatteo, using his first name only, placed an advertisement on the internet entitled "Valerie's Escorts" which inquired, "looking for someone to scratch that 'little itch?'" The ad was placed in a chat room listed as "No Hair Yet" in which child

pornography was being traded between the various members. (37a-39a). Defendant responded to the ad saying that he was “interested” and sought details. (43a-44a). When Mike asked in a subsequent communication what kind of activity Defendant was interested in, Defendant responded that he was interested in sex with a white female, that ten years of age would be best, up to twelve, and that his special interest was “just young and small, like oral.” (52a). DiMatteo indicated in response that he would be in touch with Defendant and Defendant responded, “Please do, I am anxious.” Defendant also said, “OMG (oh my God), I can’t wait.” (47a, 51a-52a).

Detective DiMatteo further testified that he subsequently received a communication from Defendant in which Defendant indicated that he was so glad they had met, and “[f]or many years I have wanted to experience and give sexual pleasure with and to pre-teen girls. I have never acted on this desire, yet I cannot suppress it and need to have this experience.” (62a-63a). After indicating a preference for a girl between eight and twelve, Defendant stated to Detective DiMatteo,

My actions. My fantasy is to be with the girl at first and get to know her, starting with innocent playing and petting. I am a very sexual person and very much enjoy oral sex. I would want to be touched and touch, even if it went no further than oral, I would be happy, but penetration would be most welcome. I have never done anal, but would love to try.

(63a)

Detective DiMatteo further testified that Defendant eventually selected “Sandi” from photographs of several girls DiMatteo had sent him. Defendant indicated to DiMatteo that he eventually wanted to be with all of the girls and that, “Mike, this exceeds my wildest dreams. I can’t believe that I can be with them.” (70a-71a).

Defendant also indicated in response to a statement by "Mike" that November would be a good time to meet "Sandi" and that he should keep him advised because he may have others who might be interested. (73a-74a).

Later, DiMatteo asked in an e-mail what Defendant thought about "Sandi" and Defendant responded, "OMG (oh my God) she is so sweet. I love her." (86a). DiMatteo indicated to Defendant that maybe he would let him talk to "Sandi" on the telephone and Defendant stated that he wanted to do that "very badly." (87a). DiMatteo concluded the communication by asking Defendant to be discreet, and Defendant indicated that being discreet was "most important" to him and that DiMatteo should not worry about that. (88a).

The lower court record further discloses that about a week later there was an e-mail communication between DiMatteo and Defendant in which Defendant inquired if DiMatteo had received the letter of sincerity which DiMatteo had requested. In the communication, Defendant indicated he had gotten a small present for "Sandi" and wanted to be able to send it to DiMatteo's address. DiMatteo replied that that would be okay and asked what the present was. Defendant replied that it was a necklace. (91a).

Later on the same day, Defendant sent another communication in which he told DiMatteo, "Ever see a mature adult acted like such a kid. The thoughts of being with her does that to me. God, she is so sweet." There was also a comment by Defendant in the communication about sending some pictures to Sandi. (101a-102a). DiMatteo also testified that he eventually received back the "letter of sincerity" he had sent to Defendant

which Defendant had signed with his name and, in parentheses, the screen name of "Luvyone-1". (108a).

Detective DiMatteo testified that in a communication on October 5<sup>th</sup>, Defendant indicated that he had obtained a telephone calling card so that "Sandi" could call him and talk to him on the telephone. Defendant gave DiMatteo the telephone number and PIN for the card. (122a-123a). Defendant had also sent DiMatteo his telephone number. (94a).

On October 12<sup>th</sup>, DiMatteo sent an e-mail message to Defendant talking about when they could possibly meet, "when the defendant could meet to have sex with the nine year old girl in Detroit." (127a-128a). Defendant said that DiMatteo could reach his page and cell phone numbers by calling his private phone at his business office and he gave DiMatteo the number. (128a).

Detective DiMatteo further testified that on October 15<sup>th</sup> Defendant sent an e-mail message to "Sandi" indicating how much he was looking forward to seeing her, that he would work out the details with Mike, that he needed to see her and that he wished he could see a picture of her before they meet. (133a). Later that day, Defendant sent an e-mail message to DiMatteo asking for all the time he could get to be with "Sandi" and that he wanted to go on the high side if that was possible. (134a).

On the next day, October 16<sup>th</sup>, Defendant sent DiMatteo an e-mail message from his place of business asking DiMatteo to page him so they could make final plans. "The 4<sup>th</sup> of November in the evening about 5:00 to 8:00 p.m. would be great." (135a). Defendant also indicated that, "Most assuredly, I would take Sandi overnight any night,

anytime, anywhere. Nothing would make me more happy." Defendant also said, "I am so looking forward to this as you well know." (135a).

On October 22<sup>nd</sup>, DiMatteo said he received a e-mail from Defendant using his business e-mail account. Defendant indicated in the communication that monetary compensation had not been discussed for the scheduled activity with "Sandi." DiMatteo sent an e-mail in response saying that the usual price was \$350 and that he would rent the room so that Defendant would not have to pay for it. (140a). DiMatteo later indicated that that amount was the agreed on price. (162a). Defendant expressed satisfaction with the way things were going. (142a).

DiMatteo testified he next received an electronic mail transmission from Defendant on October 28<sup>th</sup> in which Defendant expressed concern of not wanting anything to go wrong that might interfere with his seeing "Sandi." He again gave DiMatteo his cell phone and beeper numbers. (151a). Defendant also indicated he was changing the screen name which he was using. (152a). A new meeting date was set. (160a-161a).

Finally, on November 6, 1999, Defendant appeared at the motel in Rochester Hills where he met "Mike" in the lobby. Defendant had \$350 with in an envelope as payment for the sex with "Sandi," and he was carrying a bag in which there was a video camera, a digital camera and other miscellaneous items. Thereafter, Defendant was arrested. (162a-164a).

Given the above facts and circumstances, it is clear in the present case that Defendant requested "another person," namely Detective Michael DiMatteo, who

Defendant knew as "Mike" of "Valerie's Escorts," to commit a criminal act, namely to provide him, for a fee, a minor child for sexual activity, including both intercourse and fellatio. This is the very essence of the crime of solicitation. People v Thousand, supra, 168. Unlike the factual scenario in Thousand, where the defendant made his sexual arrangements directly with someone he thought was a fourteen year old girl ("Bekka") and who could not have been charged with committing a crime had the solicited activity occurred, the defendant in the present case actively solicited "another person" who could have been criminally charged had the solicited activity occurred. While there were several occasions in which Defendant spoke via e-mail with "Sandi" in which Detective DiMatteo played the role of "Sandi" (80a-81a, 83a-84a, 89a, 106a, 119a-122a), and two occasions in which Defendant spoke over the telephone with "Sandi" in which another female detective played the role of "Sandi" (97a, 137a-138a), the solicitation charges were not based on those contacts. By the time those communications occurred Detective DiMatteo had already made the "arrangements" to provide "Sandi" as the 10 or 12 year old with whom Defendant planned to have sexual intercourse and other first degree criminal sexual conduct.

To the extent that the Court of Appeals opinion in this case is read to say that the solicitation counts had to be dismissed because the undercover officer did not intend to commit the crime solicited, that reading must be rejected. The law appears to uniformly provide that the intent of the person solicited is immaterial to the crime of solicitation. That is to say where, as was true in the present case, the person solicited has no intention of committing the crime, the crime of solicitation is nevertheless complete once the

solicitation is made. See People v Vanderlinder, supra, 450. It is not a defense to a solicitation charge that, unknown to the solicitor, the person solicited did not intend to commit the crime. The defendant's culpability is measured by the circumstances as he believes them to be. LaFave and Scott, Substantive Criminal Law, Chap 6.1, p. 15. Specifically, as applied to the facts of this case, it has been held that is no defense that the person solicited was an undercover agent and would not have committed the crime solicited. People v Crawford, 232 Mich App 608, 616 (1998), citing People v Salazar, 140 Mich App 137, 143 (1985); United States v Devorkin, 159 F3d 465 (9th Cir., 1998); People v Breton, 603 NE2d 1290 (Ill App, 1992); Meyer v State, 425 A2d 664 (Md App, 1981). See also the Commentary for CJI 2d, 10.6 which provides:

Now, the prosecutor does not have to prove that the person who was solicited committed, attempted to commit, or intended to commit the crime. Both the House and Senate legislative analysis specifically state that when a person makes an offer to an undercover police officer, the crime of solicitation has been committed.

Accordingly, the fact that Michael DiMatteo, known to Defendant as "Mike," was an undercover officer who had no intention of providing the nine year old girl ("Sandi") for Defendant could not be a basis upon which to dismiss the solicitation charges against him.

In sum, the crime of solicitation is committed when one person offers another person money or other gift to do an act which if completed would constitute a felony. MCL 750.157b(3); People v Thousand, supra, 168; People v Crawford, supra, 616. The facts of the present case fit this set of elements precisely. Defendant offered "Mike" (an



actual person) money to provide him with a twelve year old girl for sexual intercourse and other sexual conduct. Had "Mike" in fact completed the act and provided the minor girl, "Mike" would have been guilty of the felony of aiding and abetting Defendant in his criminal conduct, or would have been guilty of other felony offenses which prohibit the procuring and providing of minor children for sexual services. Indeed, since the contact with "Mike" was in California, and "Mike" would have been bringing the minor girl to Michigan, "Mike" would have been guilty of violating a federal law which prohibits transporting minors across state lines to engage in sexual activity, a 15 year felony. See 18 USCS § 2423. For these reasons, the People respectfully contend that the Court of Appeals erred in its application of People v Thousand, supra, a case which did not factually involve the crime of solicitation, to the facts of this case, and the Court erred in concluding that the solicitation counts were unsupported by those facts. The holding and language in People v Thousand, supra, in so far as it addresses the crime of solicitation, requires the opposite result.

(C)

Before concluding, the People wish to draw the Court's attention to a recently enacted statute, enacted subsequent to the time the facts arose in the present case, which now would appear to specifically speak to and govern the type of conduct in which Defendant engaged. MCL 750. 145d, as amended, now prohibits the use of the internet for the purpose of committing a crime against a minor. The pertinent portion of the statute provides:

(1) A person shall not use the internet or a computer, computer program, computer network, or computer system to communicate with any person for the purpose of doing any of the following:

(a) Committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under section 145 a, 145 c, 157c, 349, 350, 520b, 520c, 520d, 520e or 520g, or section 5 of 1978 PA 33, MCL 722.675, in which the victim or the intended victim is a minor or is believed by that person to be a minor.

Had this statute been available at the time the facts in the present case arose it would have been used to charge Defendant since he used a computer on the internet to communicate with both the police officer ("Mike") and the minor child "Sandi" for the purpose of committing acts proscribed by section 520b (first degree criminal sexual conduct) or section 145c (child sexual abusive activity) since the intended victim was "believed to be a minor" by him. As such, the general solicitation statute at issue in this appeal would not have been needed.

RELIEF

WHEREFORE, David Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Thomas Richards, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse and vacate that portion of the Court of Appeals opinion which reversed Defendant's convictions for solicitation to commit first degree criminal sexual conduct and to reinstate those convictions and the sentences imposed on them.

Respectfully submitted,

DAVID GORCYCA  
PROSECUTING ATTORNEY  
OAKLAND COUNTY

BY: \_\_\_\_\_  
THOMAS RICHARDS (P19416)  
Assistant Prosecuting Attorney

DATED: September 19, 2002